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22 SANDY HACKETT

23
24 UNITED STATES DISTRICT COURT
25 DISTRICT OF NEVADA

26 SANDY HACKETT, an individual,
27 Plaintiff,

28 vs.

29 RICHARD FEENEY, an individual;
30 ARTHUR PETRIE, an individual; TRP
31 ENTERTAINMENT, LLC, a Nevada
32 limited liability company, PLAYLV
33 GAMING OPERATIONS, LLC d/b/a
34 PLAZA HOTEL AND CASINO, a
35 Nevada limited liability corporation,
36 BROADWAY BOOKING OFFICE
37 NYC, LTD, a New York corporation,

38 Defendants.

39 CASE NO. 2:09-CV-02075-RLH-LRL
40 Hon. Roger L. Hunt

41 **OPPOSITION TO DEFENDANTS/
42 COUNTERCLAIMANTS' MOTION
43 TO COMPEL THE DEPOSITION
44 OF PLAINTIFF SANDY HACKETT**

45 Action Commenced: October 28, 2009

46 AND RELATED COUNTERCLAIMS.

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TABLE OF AUTHORITIES

1 Plaintiff/Counter-Defendant SANDY HACKETT (“Hackett” or “Plaintiff”) hereby
 2 submits the following Opposition to Defendants/Counterclaimants’ Motion to
 3 Compel the Deposition of Plaintiff Sandy Hackett as follows:

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I.**

6 **INTRODUCTION**

7 To be sure, Greenberg Traurig’s (“GT”) conflict of interest in representing
 8 Defendants in this action adverse to its former client, Plaintiff Sandy Hackett, is
 9 central to the present motion. GT has persistently violated several applicable
 10 Nevada Rules of Professional Conduct warranting its disqualification. GT also has
 11 stalled for months the diligent efforts of Hackett to secure his complete client files in
 12 the matters in which Mark Tratos (“Tratos”), GT and GT’s predecessor in interest,
 13 Quirk & Tratos, represented and counseled Hackett.

14 Even as this brief is submitted, GT, Tratos and Quirk & Tratos still have not
 15 given full access, much less “surrendered” Hackett’s files regarding such matters as
 16 required by the Nevada Rules of Professional Conduct 1.16(d) after termination of
 17 their representation of Hackett.

18 If Hackett were to be examined in deposition today, he would be
 19 disadvantaged by not knowing all the materials and information that are in **his** client
 20 files from the prior representations by these lawyers who formerly represented him.

21 **A. The Prior Representation of Hackett**

22 GT and its predecessors, including Tratos, have a conflict over having
 23 represented and counseled Hackett in at least two earlier matters. The first of those
 24 is the “2002 Counseling” of Messrs. Hackett, Richard Feeney (“Feeney”) and
 25 Arthur Petrie (“Petrie”) **before** TRP Entertainment, LLC (“TRP”) was formed. The
 26 Hackett Declaration in Support of his Motion to Disqualify discusses that
 27 counseling in great detail, in contrast to the superficial and inaccurate description in
 28 the Tratos Declaration.

1 The second key representation of Hackett transpired during 2007 to 2008 in
 2 the so-called “Barton Music Cases”¹ in which Tratos and GT represented Hackett as
 3 **his attorney of record** (along with TRP and Feeney), **from the outset** – not late in
 4 the lives of those cases, as Tratos declares.

5 Both the 2002 Counseling and the Barton Music Cases are “substantially
 6 related” to the present action.²

7 **B. No Waiver of the Conflict or the Right to Disqualify While Struggling to**
 8 **Obtain Hackett’s Client Files To Secure The Full Evidence of the**
 9 **Conflict**

10 There has been no waiver of the conflict, or of the right to disqualify. *Miller*
 11 *v. Alagna*, 138 F. Supp. 2d 1252 (C.D. Cal. 2000). Defendants try to twist their
 12 obstruction of Hackett’s efforts to obtain the full evidence of the conflict (so that he
 13 can present the full evidence to the court) into being a waiver of such right. This
 14 argument must fail.

15 Defendants argue that they will be prejudiced if disqualified after stalling over
 16 providing Hackett’s files, on the theory that they spent time on the case. This is like
 17 the man who kills his parents who then pleads with a court at his sentencing hearing
 18 to “take pity on me, for I am an orphan.”

19 ///

20

21 ¹ These were two actions arising out of the same nucleus of operative facts. In a
 22 pre-emptive strike, TRP first sued Barton Music and other music licensing
 23 companies on August 7, 2007 in this courthouse over a dispute regarding copyright
 24 claims involving the TRP show “Rat Pack Is Back”. GT and Tratos are co-counsel
 25 of record on the complaint. On October 9, 2007 Barton Music (and other aligned
 26 companies) sued TRP, Hackett and Feeney. The motion to dismiss that action was
 27 filed December 6, 2007 by GT, along with its co-counsel, Watson Rounds.

28 ² There are other aspects of GT representing Hackett individually, as a member of
 29 the TRP LLC, but for the sake of simplicity of presentation, Hackett relies here on
 30 these two prior circumstances of representation by Tratos and GT.

1 The “prejudice” of having responded to Hackett’s discovery – largely
 2 involving the client file matters – was hewn by the hands of Defendants and their
 3 conflicted attorneys. The self-inflicted prejudice to Defendants is minimal, in that
 4 they have conducted no depositions to date. They have not had to answer
 5 interrogatories or requests for admissions, nor respond to the inevitable motions for
 6 summary judgment on their counterclaims. They have attended only three
 7 depositions.³

8 Hackett raised the conflict before the lawsuit was filed and demanded access
 9 to his files. GT has ignored the obligation to provide those files. See Ex. “1” to
 10 Defendants’ moving papers. Initially, Tratos made the argument, before suit was
 11 filed, that personal representation of Hackett was more than 5 years prior, as if that
 12 time gap made any difference.⁴ Accordingly, promptly after discovery was
 13 permitted in this case, Hackett served discovery upon GT, Tratos and Quirk &
 14 Tratos to obtain those records. Defendants moved to quash those subpoenas, with
 15 no effort to meet and confer first. That Motion ignored the true issues, which
 16 Hackett addressed in his Opposition. Hackett stated then, three months ago, that the
 17 documents should be produced, and if not, a privilege log should be given and the
 18 documents submitted for *in camera* review.⁵

19 Plaintiff also sought production of those same documents in discovery
 20 propounded to Defendants. Plaintiff has doggedly pursued efforts to obtain the
 21 cooperation of Defendants and their counsel to obtain relevant documents, including
 22 Hackett’s own client files. Defendants and their lawyers still have not produced the
 23 complete files, and still offer unfounded excuses for not producing them, including
 24

25 ³ The PMK of TRP (per Feeney, on Mar. 3 and 19); Petrie (April 21), and Plaza
 26 Hotel (April 22-less than a half-day).

27 ⁴ Tratos’ explanation of his counseling of Hackett was odd, and misstated his role.

28 ⁵ This motion has been briefed fully since March 5, 2010.

1 the indefensible notion that to represent a party client in United States District Court
 2 in the Barton Music Cases carries with it no real professional or legal duties to such
 3 client.

4 Having still been thwarted in obtaining Hackett's complete client files,
 5 despite all the effort over the last several months,⁶ Plaintiff's counsel advised on
 6 April 23, 2010, that it would not permit the deposition of Sandy Hackett to proceed,
 7 on the inconvenient, unilaterally set date of May 5. The primary reason given was
 8 the conflict issue – including the failure to produce Hackett's own client files. The
 9 secondary reason was accommodation of Hackett's performance commitments;
 10 May 5 was inconvenient. Hackett's counsel advised that they would file Hackett's
 11 motion to disqualify, and proceed with what he has been able to wrestle from GT so
 12 far. Defendants, however, were "first to file" on the issue, having now brought their
 13 Motion to Compel.

14 **C. Hackett is Filing Concurrently His Motion to Disqualify, and for Related**
 15 **Relief**

16 Plaintiff is concurrently filing his own motion:

- 17 (a) to disqualify GT and Tratos,
- 18 (b) to compel the deposition of Tratos incidental to the disqualification issue,
- 19 (c) to require turnover of Hackett's complete client files, and
- 20 (d) to bar the deposition of Hackett until such time as such relief is complied
 21 with by GT.

22 That motion is more plenary than this Opposition in its presentation of the conflict
 23 issues. By this reference, Plaintiff incorporates the matters set out there, as further
 24 opposition to the Motion to Compel Hackett's deposition. That Motion sets out the
 25 background facts alleged in the complaint, the causes of action and defenses alleged

26
 27 ⁶ Defendants have stalled and interfered with Plaintiff's discovery on other matters
 28 as well; See King Decl. generally.

1 in the present action, and the relationship between the present action and the prior
 2 representation of Hackett by Tratos and GT.

3 There may be a need to file under seal Hackett's Motion and supporting
 4 declaration, or portions of its supporting papers, which might delay briefly the filing
 5 of it until shortly after the filing of this Opposition.

6 **D. GT's Unsupported Concept of "Faux" Representation of a Party**

7 In an effort to avoid the rule that a lawyer shall not represent interests adverse
 8 to a former client on matters substantially related, GT has invented the manifestly
 9 unsupportable position that its representation of Hackett in the Barton Music Cases
 10 were "pretend" or "faux" appearances and representation of record. GT and
 11 Defendants assert that filings by GT in those cases with its member's names and
 12 signatures on court filings, and the physical appearance of GT attorneys before the
 13 court on behalf of Hackett – did not carry with them obligations imposed under Rule
 14 11 and other federal rules. Despite repeated written request to GT for citation to any
 15 legally recognized support for this novel notion, GT has ignored the inquiry and
 16 failed to explain any conceivable legal support for this position. No such authority
 17 is cited in its Motion. In persisting with this unfounded argument to the Court, GT
 18 deepens its transgression, by misstating to the Court its role in the Barton Music
 19 Cases.

20 **II.**

21 **THE PRIOR REPRESENTATION IS SUBSTANTIALLY RELATED**

22 As Defendants acknowledge, Rule 1.9 of the Nevada Rules of Professional
 23 Conduct (adopted by this court in Local Rule 1A-1-7(a)) requires disqualification of
 24 GT and Tratos if their prior representation of Hackett is substantially related to the
 25 present action. *Waid v. Eighth Judicial Court District*, 121 Nev. 605, 119 P. 3d
 26 1219 (2005).

27 ///

28 ///

1 The 2002 Counseling by Tratos and others, at what was then Quirk & Tratos
 2 (now merged with GT), and the later representation by Tratos and GT of Hackett in
 3 the Barton Music Cases, are substantially related to the instant action.

4 **A. The 2002 Counseling**

5 The 2002 Counseling involved Tratos, and other lawyers at his firm of Quirk
 6 & Tratos (including Laurie Thompson, now at GT also), counseling Hackett,
 7 Feeney and Petrie regarding the production of a show that they contemplated
 8 producing, based on, or as a tribute to, the so-called “Rat Pack.” Feeney wanted to
 9 make sure that they did not run afoul of any intellectual property issues involving
 10 other competing “Rat Pack” shows. They sought counsel from Tratos, who Feeney
 11 told Hackett was knowledgeable in the area of intellectual property law, including
 12 trademark copyright and exploitation of name and likeness. Confidential
 13 information about Hackett and his personal rights to exploit matters pertaining to
 14 Joey Bishop, and his relationship with Rat Pack member Joey Bishop, were
 15 discussed with Tratos in these counseling sessions.

16 At the time of the 2002 Counseling meetings, no limited liability company of
 17 TRP existed. TRP was not registered with the Nevada Secretary of State until
 18 April 25, 2002.

19 That 2002 Counseling is substantially related to the very matters that are at
 20 issue in this case, including Plaintiff’s complaint and the counterclaims by TRP,
 21 Feeney and Petrie for alleged trademark infringement regarding the “Rat Pack is
 22 Back” mark registered to TRP. Tratos declares that the meetings were only about
 23 selecting a name, *i.e.* trademark issues. The Hackett copyright and rights to exploit
 24 the script written by Hackett, as well as to exploit the matters licensed to Hackett by
 25 Joey Bishop – about which Tratos counseled Hackett in 2002 – are implicated
 26 directly in this present action. That license from Joey Bishop is personal to Hackett,
 27 and Hackett obviously had the reasonable expectation that he was being counseled
 28 personally and individually in 2002 with respect to such matters.

1 **B. The Barton Music Cases**

2 The Barton Music Cases involved claims by music licensing companies that
 3 TRP, Hackett and Feeney were unlawfully using the licensing companies'
 4 copyrighted songs in the stage production of the TRP "Rat Pack Is Back" show.
 5 TRP contended that use of the songs was covered in the venue hotels' BMI music
 6 license. A significant dispute in the case was the nature of the TRP show
 7 performance. The fact that Hackett had registered his script back in 2005 in his
 8 name was a significant aspect of that case.

9 Feeney reluctantly gave poignant testimony in this case, establishing the fact
 10 that Hackett's 2005 script registration (which is at issue in this litigation) was an
 11 important aspect of the Barton Music Cases:

12 **Q. Well, did the existence of Sandy Hackett's registered
 13 copyright ever turn from a potential problem to an actual problem
 14 in the [Barton] litigation?**

15 **A: It depends on how you--what you would call a problem. If it
 16 gave them a gigantic club with which to negotiate and bring us
 17 down to our knees on a settlement, it became a huge problem.**

18 TRP PMK Depo., Vol. II, March 3, 2010, p. 221:13-19. **Exhibit "28"**⁷

19 The relevant authority provides that where there is a substantial relationship
 20 between the representation of the former client and the later action in which the
 21 lawyer is adverse to his former client, the client need not disclose the confidential
 22 information that was disclosed in order to disqualify the attorney. Nevertheless,

23 ⁷ Feeney admitted that he has known since July 2005 that Sandy Hackett filed a
 24 copyright registration on June 7, 2005 for his script that is at the heart of this
 25 lawsuit. **Exhibit "28"** at p. 237:19-239:20. Next, he admitted that in the Barton
 26 Music Cases, where GT represented Hackett, Feeney and TRP as counsel of record,
 27 the existence of the copyright registration was an issue in the case. He tried to tap-
 28 dance around its significance, initially labeling it a "potential problem." *Id* at 229:2-
 20. When asked the question quoted here, he gave up the damning answer.

1 Hackett submits a declaration regarding the nature of these matters, in recognition of
 2 this court's willingness to entertain a fact-intensive analysis as it did in the *In-N-Out*
 3 *Burger* case cited by Defendants. *In-N-Out Burger v. Tire & Auto, Inc.* 2008 WL
 4 2937294 (CD. Nev.)⁸ Hackett does so, noting that he is not waiving the
 5 confidentiality of such matters.

6 Defendants' citation to Wisconsin law is unavailing for the notion that the
 7 subsequent formation of the TRP limited liability company could somehow relate
 8 back to deny the existence of a reasonable belief by Hackett that his individual
 9 interests were being counseled. *Jesse by Reinecke v. Danforth*, 169 Wis. 2d 229
 10 (Wis. 1992). Among other reasons, as Tratos admits, he did not form the LLC of
 11 TRP. Tratos gave legal advice about intellectual property issues. Another case
 12 cited by Defendants, *Manion v. Nagin*, 394 F. 3rd 1062 (8th Cir. 2005), as Defendants
 13 grudgingly acknowledge, recognizes (under Wisconsin law) that even though an
 14 attorney (under Wisconsin law) may counsel a corporation regarding its
 15 incorporation, an individual shareholder officer might, depending upon the facts,
 16 reasonably expect that his individual interests are being represented as well. The
 17

18 ⁸ Hackett notes that in that case, the court – and evidently the adverse parties –
 19 were afforded access to the billing entries of the out of state attorneys for In-N-Out
 20 Burger who had retained Watson Rounds as local counsel in the prior matter, as well
 21 as the Watson Rounds billings in the prior matter. In the case now before the Court,
 22 GT (and Tratos) have neither produced nor identified on a privilege log any such
 23 time records in either the 2002 Counseling or the Barton Music Cases. That is one
 24 reason Plaintiff has sought such records all these months. The privilege log
 25 belatedly served by Defendants in this action on May 14, 2010 (three months after
 26 Defendants filed their Reply on their Motion to Quash), regarding GT documents in
 27 the Barton Music Cases is notably incomplete. A privilege log produced by Watson
 28 Rounds in the Barton Music Cases reflects interaction with GT starting in June,
 2007. The Hackett Decl. attaches copies of e-mails reflecting GT involvement in
 May, 2007. The earliest withheld document of GT noted on its May 14, 2010
 privilege log is dated October 11, 2007 – omitting these earlier documents known to
 exist.

28

1 objective, reasonable expectations of the ostensible individual client will prevail.

2 A California case cuts against Defendants' position. *Woods v. Superior*
3 *Court*, 149 Cal. App. 3d 931, 197 Cal. Rptr. 185 (1983) held that in a marital
4 dissolution action, in which the wife had moved to join as a party the closely held
5 corporation owned by the marital community estate (*i.e.*, 50/50 ownership), the
6 lawyer who had for years represented the corporation could not represent the
7 husband. "We conclude that, absent consent or waiver, the attorney of a family-
8 owned business, corporate or otherwise, should not represent one owner against the
9 other in a dissolution action." 149 Cal. App. 3d at p. 937, 197 Cal. Rptr. 185. The
10 instant action by Plaintiff Hackett includes a cause of action for dissolution of the
11 TRP LLC, rendering *Woods* applicable to both as to the substantial relation issue,
12 and on the "dissolution" aspect.

13 The Barton Music Cases were two more or less mirror image cases. TRP
14 sued first. Then Barton Music sued TRP, Hackett and Feeney over copyright claims
15 arising from the production of “The Rat Pack is Back” show. Tratos and GT were
16 the lawyers of record for Hackett from the outset of this litigation. The assertion, in
17 Tratos’ declaration, that his firm only became involved late in the game is amply
18 controverted by review of the dockets alone. See also King Decl. in support of
19 Motion to Disqualify. Similarly, Tratos’ statement that GT got involved only late in
20 the game to prepare a summary judgment motion is untrue. No such motion was
21 ever filed, and no privilege log reflects the preparation of any such motion.

III.

**DEFENDANT'S REQUEST FOR
SANCTIONS IS UNSUPPORTED**

25 Defendants make fleeting reference to being entitled to sanctions in bringing
26 their Motion to Compel. That request must be denied. Most importantly, Hackett's
27 position is taken in the utmost of good faith, given that the conflict of GT is palpable
28 and Defendants have persistently withheld Hackett's own files. On more technical

1 grounds, the Notice of the Motion does not request sanctions, requiring denial of
2 such a passing, unsupported request for sanctions in the Memorandum of Points &
3 Authorities. Further, no declaration is offered in the moving papers regarding what
4 fees or expenses allegedly were incurred. Any belated declaration in a Reply would
5 not be proper, as it would deny Plaintiff the required due process opportunity to
6 respond.

7 **IV.**

8 **CONCLUSION**

9 As set out here, and more fully in the Motion to Disqualify being filed by
10 Plaintiff including supporting declarations, Hackett's deposition should not be taken
11 by GT, who formerly represented him in prior matters substantially related to the
12 present dispute.

13

14 DATED: May 24, 2010

KING, HOLMES, PATERNO & BERLINER, LLP

15

16 By: _____

17 HOWARD E. KING

18 Attorneys for Plaintiff/Counter-Defendant SANDY
19 HACKETT

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1900 Avenue of the Stars, 25th Floor, Los Angeles, California 90067-4506.

On May 24, 2010, I served the following document(s) described as
**OPPOSITION TO DEFENDANTS/ COUNTERCLAIMANTS' MOTION TO
COMPEL THE DEPOSITION OF PLAINTIFF SANDY HACKETT** on all
interested parties in this action by placing true copies thereof addressed as follows:

See Attached Service List

8 BY MAIL, enclosed in sealed envelope(s): I am "readily familiar" with the
9 firm's practice of collection and processing correspondence for mailing. Under that
10 practice it would be deposited with the U.S. postal service on that same day with
11 postage thereon fully prepaid at Los Angeles, California in the ordinary course of
12 business. I am aware that on motion of the party served, service is presumed invalid
13 if postal cancellation date or postage meter date is more than one day after date of
14 deposit for mailing in affidavit.

15 BY FEDERAL EXPRESS DELIVERY, enclosed in sealed envelope(s): I am
16 "readily familiar" with the firm's practice of collection and processing items for
17 Federal Express delivery. Under that practice it would be deposited at Los Angeles,
18 California, in an envelope or package designated by Federal Express in a facility
19 regularly maintained by Federal Express or delivered to a courier or driver
20 authorized to receive documents on its behalf with delivery fees paid or provided
21 for.

22 BY PERSONAL SERVICE, enclosed in sealed envelope(s): I delivered such
23 envelope(s) by hand to the office of the addressee(s).

24 BY FACSIMILE: I caused the foregoing document(s) to be served by
25 facsimile transmission from sending facsimile machine number (310) 282-8903. to
26 each interested party at the facsimile machine telephone number shown. Each
27 transmission was reported as complete and without error. A transmission report was
28 properly issued by the sending facsimile machine for each interested party served.

29 BY ELECTRONIC MAIL (.PDF FORMAT): I caused a true copy of the
30 afore-named document[s] to be sent via e-mail (pdf format) to the interested
31 party/ies at the e-mail address/es indicated below.

Executed on May 24, 2010, at Los Angeles, California.

23 (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

24 (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Joey S. Gossett-Evans
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